IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE

AND

IN THE MATTER OF THE COMPLAINTS MADE BY THE ONTARIO HUMAN RIGHTS COMMISSION AND MR. CEZAR ABARY ALLEGING DISCRIMINATION IN EMPLOYMENT BY NORTH YORK BRANSON HOSPITAL AND EDWIN HILL

# INTERIM DECISION

ON

MOTION OF "NO CASE"

ED RATUSHNY, Q.C.

BOARD OF INQUIRY

## INTERIM DECISION

Following the testimony of the last witness called by the Complainant, counsel for the Ontario Human Rights Commission stated that no further evidence would be called by the Commission. Counsel for the Respondent then applied to have the complaint dismissed.

This application was in the nature of an application for a directed verdict in a criminal case. Counsel for the Respondent argued that, prior to electing whether or not to call evidence, the Respondent was entitled to have the evidence assessed to determine whether or not there was, in effect, a "case to meet". In the event that there were "no case" the proceedings should be terminated. He stated that in preparing for this submission over the past several months, no authority could be found dealing squarely with this kind of situation in relation to administrative tribunals.

Counsel for the Commission cited a passage from the decision of Professor Hubbard in Nimako v. Canadian National Hotels (1987) 8 CHRR at para. 31710:

> The circumstances of this complaint as understood and alleged by the commission were certainly not trivial, frivolous or vexatious and, although the complainant may have acted in bad faith in securing its support,— the Commission did not act in bad faith in giving it. Moreover, the respondent withdrew its motion of non-suit rather than elect not to call evidence, thus revealing its own uncertainty as to the strength of the Commision's prima facie case.

In the absence of other authority, she argued that the reference to withdrawing the non-suit motion rather than electing not to call evidence, should be treated as reflecting the appropriate practice in relation to applications of this nature.

In the absence of greater elaboration as to the exact nature of the motion in the Nimako decision, I am reluctant to draw

such an inference. In particular, there is no indication as to the evidentiary standard which Professor Hubbard was asked to apply in relation to the "non-suit" motion.

In our case, counsel for the Respondent did not ask this Board to weigh the evidence. Rather the standard sought to be applied was whether there was any evidence capable of supporting the complaint. In addressing that issue, it is implicit that this is not the appropriate stage at which to assess the credibility of witnesses.

I am of the view that an application in the nature of "no case to meet" should be permitted before administrative tribunals without requiring the Respondent first to elect whether or not to call evidence. The basic principle has been articulated by Mr. Justice Lamer in Dubois v. The Queen [1985] 2 S.C.R. 350. Essentially, it is that an accused should not be required to present evidence unless the Crown has first presented evidence upon which a conviction could be based. Similarly, in administrative hearings, particularly where the propriety of conduct is involved, a respondent should not be required to present evidence unless the proponent has first presented evidence upon which an adverse finding could be based. In other words, the principles of fairness should not require an evidentiary response in the absence of a "case to meet".

This proposition is not as far-reaching as it might seem at first. It must be kept in mind that the evidentiary threshold is very low i.e. "any" evidence capable of supporting the adverse finding. Moreover, the credibility of evidence is not to be weighed at this stage in the absence of the extreme situation of testimony which is so far-fetched as not to be capable of belief by any reasonable person. Finally, the nature of the proceedings themselves must be taken into account. All administrative tribunals are different and the nature of the issues and evidence will have a bearing upon what will constitute a "case to meet" in relation to a particular tribunal.

With respect to a board of inquiry established under the Ontario Human Rights Code, the problems of proof are unique. A number of board decisions have discussed the difficulties in establishing discrimination since so often it is subtle or disguised. In some of these decisions, a contravention of the Code has been found as the result of the absence of any other reasonable explanation for the alleged discriminatory conduct. In these circumstances, a ruling of "no case to meet" is likely to be infrequent before boards of inquiry. Nevertheless, where there is, indeed, no case to meet, the Respondent should be entitled to a termination of the inquiry prior to electing whether or not to call evidence.

It should also be noted that a board of inquiry under the the Ontario Human Rights Code is not analagous to a public inquiry under the Public Inquiries Act R.S.O. 1980 c. 411. Boards of inquiry under the Code are not truly inquiries in the sense of having control over the calling of witnesses and presentation of evidence before them. Section 38(2)(a) of the Code specifically provides that it is "... the Commission, which shall have carriage of the complaint".

Applying these conclusions to the evidence before this Board, the application of the Respondent must be dismissed. There is some evidence which, if believed, could support a contravention of the Code. This is not an appropriate occasion for reviewing and assessing the evidence and I specifically refrain from doing so.

The hearing in this matter will continue in Toronto on the dates previously agreed upon by all three counsel, namely May 9th to 13th inclusive.

Dated at Ottawa this 22nd day of March, 1988.

Ed Ratushny
Board of Inquiry